

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA - NEW ALBANY**

IN THE MATTER OF:	.	Case #10-93904-BHL-11
	.	
EASTERN LIVESTOCK CO., LLC	.	New Albany, Indiana
	.	August 22, 2011
Debtor	.	1:51:25 p.m.

**TRANSCRIPT OF TELEPHONIC HEARINGS RE:
CONTINUED STATUS CONFERENCE ON:
(#501) TRUSTEE JAMES KNAUER'S MOTION FOR AUTHORITY (TRUSTEE'S
PURCHASE MONEY CLAIMS REPORT, MOTION TO TRANSFER FUNDS, AND
NOTICE OF RELEASE OF PROCEEDS FROM ACCOUNT, WITH OBJECTIONS
AND AMENDED OBJECTIONS AND RESPONSES THERETO FILED;
CONTINUED TELEPHONIC HEARING ON:
(#616) MOTION TO QUASH ORDER GRANTING MOTION FOR 2004
EXAMINATION UPON THE US DEPARTMENT OF AGRICULTURE, GRAIN
INSPECTION, PACKERS & STOCKYARDS, FILED BY USDA GRAIN INS.;
(#630) RESPONSE IN OPPOSITION TO [#616] FILED BY FLORIDA ASSOCIATION
LIVESTOCK MARKET;
(#634) MOTION TO EXTEND TIME TO FILE THE GIBSON TRUSTEE'S PURCHASE
MONEY CLAIMS (SECOND EXTENSION) FILED BY KATHRYN FRY;
(#664) TRUSTEE JAMES KNAUER'S MOTION FOR ORDER APPROVING LEASE
BY AND BETWEEN TRUSTEE AND REPUBLIC BANK & TRUST CO.
BEFORE THE HONORABLE BASIL H. LORCH, III, J.U.S.B.C.**

APPEARANCES: (See Next Page)

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1 (At 1:51:25 p.m.)

2 THE COURT: Good afternoon. Be seated. All
3 right, we're on the record in the matter of Eastern Livestock.
4 The courtroom deputy has already taken the appearances of
5 those appearing on the phone. I would just ask and remind
6 those on the phone and here to state your name before you
7 speak so that we can try to make a record and hold you
8 accountable for what you say.

9 The other matter about those on the phone is don't
10 put us on hold, and please keep your phone on mute unless you
11 intend to speak.

12 Would we have the attorneys in the courtroom state
13 the appearances, please?

14 MS. HALL: Terry Hall and Kevin Toner for the
15 Trustee of the debtor's estate, and we have Jim Knauer,
16 Trustee.

17 MR. BOWLES: Chip Bowles, Christie Moore, and John
18 Ames -- Greenebaum, Doll & McDonald, for Superior Livestock,
19 Joplin, and several other clients, Your Honor.

20 MR. LaTOUR: Good afternoon, Your Honor. Randall
21 LaTour from Vorys, Sater, Seymour & Pease representing Fifth
22 Third Bank.

23 MS. DELCOTTO: Good afternoon, Your Honor. Laura
24 Day Delcotto appearing for Alton Darnell, Blue Grass
25 Stockyards of Campbellsville, Blue Grass Stockyards of

1 Richmond, Blue Grass Stockyard 8, Blue Grass Naples
2 Stockyards, Blue Grass South Livestock Market, East Tennessee
3 Livestock Market, Piedmont Livestock Company, Southeast
4 Livestock Exchange, and in the Friona Interpleader, all of
5 those parties, in addition to Moseley Cattle Auction.

6 MR. DONNELLON: Good afternoon, Your Honor. Dan
7 Donnellon for First Bank & Trust.

8 MR. STOSBERG: Good afternoon, Judge. Andrew
9 Stosberg on behalf of Willie Downs.

10 MR. SMITH: Bill Smith on behalf of Coffeyville
11 Livestock Market, LLC.

12 MR. MORRIS: Allen Morris on behalf of Republic
13 Bank & Trust, Your Honor.

14 THE COURT: All right. We have an agenda which I
15 hope you all have seen. The first matter I show is the
16 Trustee's motion to transfer funds, and the variety and extent
17 -- extensive objections and responses filed thereto, going up
18 to KK; and I'm not sure that includes everything filed today.

19 Let's -- I've read your pleadings, including I think
20 most of which was filed today -- maybe I'm not quite current
21 either, but there seems to be some common themes that run
22 through this dispute. And I guess the issue, the first issue
23 as far as the Court is concerned is whether or not we need a
24 -- some sort of a preliminary determination of fact and/or law
25 in order to resolve this matter.

1 The -- you know, the parties have raised -- I'm not
2 going to try to remember off the top of my head all the
3 different objections; but I guess the first question is:
4 Specifically, which of those issues that have been raised --
5 you know, whether or not the debtor held these funds in trust
6 because of some definition -- whether or not only a small
7 portion of these proceeds for the debtors is a commission --
8 you know, the -- which of these in any party's -- by any
9 party's assertion -- would require a factual determination by
10 this Court?

11 Ms. Hall, do you want to take a first stab at that?
12 I know your opinion is different than most other people's in
13 the room, but --

14 MS. HALL: I'm not convinced of that. Your Honor,
15 I think it would be helpful if we just -- and I'll try not to
16 take too much of the Court's time, because I know there are
17 some issues that are specific that people in the room who
18 don't have an interest in this issue at all, so I'll try to
19 move quickly through here.

20 The Court may remember that this whole matter
21 started with the very, very, very early motion filed by the
22 Trustee in the case to complete cattle sales and allow the
23 estate to bring in funds from people who the estate had sold
24 cattle to who owed the estate money but to whom other people
25 were saying, "No, you need to pay me," and yet those people

1 felt that they needed to pay the estate.

2 So we offered a motion that was approved by the
3 Court that allowed the estate to finish those sales of cattle,
4 receive those proceeds into the estate, indemnify the person
5 who was providing them to us. In other words, do not get --
6 not get more interpleaders filed while we had a bankruptcy
7 case going on.

8 And then we started giving opportunity to people in
9 the case to raise specifically why they believed they had a
10 claim to these kinds of proceeds, these particular
11 transactions superior to the estate. In other words, if they
12 had a particular transaction and they pled the facts, or if
13 they had a particular transaction and they pled the law that
14 said, "Here's why this belongs to us and not to the estate,"
15 and the Trustee -- you wouldn't know it from the pleadings,
16 but the Trustee had a fiduciary duty to all the parties in the
17 case, and his duty is to get as much recovery for all persons.

18 Anytime you have a particular party that's going to
19 take funds out of the property of the estate, that reduces the
20 recovery for everyone.

21 So first, we gave people an opportunity to object to
22 the cattle sales motion. Then we gave people an opportunity
23 to file a claim specific to those proceeds. That was the
24 purchase money claim bar date. Then we gave people an
25 opportunity to file a general claim. Then we gave people an

1 opportunity to file a notice when we listed -- we went through
2 all the claims. Nobody pled in particularity why any of these
3 accounts belonged to them and no one else.

4 We gave them an opportunity to file an objection.
5 People filed *general* objections and said, "Well, I may, but I
6 don't know, so I need more information." So we gave them
7 more time. We filed more information. We gave them access to
8 that data base. We gave them another opportunity to file an
9 objection, and according to the Court's order plead with
10 particularity the facts and the law as to why they would have
11 a claim to those proceeds outside of property of the estate.

12 You need to remember that all we're trying to do is
13 to remove property from escrow and just leave it in the
14 general estate. We're not trying to move it to Fifth Third at
15 this point. If there is a dispute over the proceeds between
16 Fifth Third and somebody else, that's not part of this
17 proceeding right now.

18 Then we gave them -- so we had four more people file
19 objections, but again they didn't plead any particularity, law
20 or facts -- as to why any of these accounts belong to *them* and
21 not the general creditors of the estate.

22 So then we had late-filed objections, again pleading
23 general law that we take exception to, including the letter
24 that was filed today, because it's misrep -- in our opinion,
25 misrepresenting the law related to how Eastern operated under

1 GIPSA.

2 You may also remember that people objected on the
3 basis of asserting they might have a state lien, or they might
4 have an agricultural lien, or they might have particular state
5 law that applied to their particular state transaction. And
6 yet no one pleaded that. No one filed a claim about it. No
7 one filed an objection about it; and saying that you didn't
8 know the specific facts, and you needed more information from
9 the Trustee, you certainly didn't need to know the state that
10 might apply, because they're in charge of the transaction.
11 They know what state they sold the cattle in, and if there was
12 a state law or a state lien that applied, they should have
13 pled it. It didn't get pled.

14 So the question from the Court is, is there a
15 factual determination -- and I guess one more point. People
16 will raise the issue of constructive law, that outside of
17 bankruptcy, because there was fraud involved, that there may
18 be a constructive law claim that people could raise. The
19 Trustee in its response to the first wave of objections laid
20 out the law the way the Trustee understands it, as to how
21 common constructive trust applies or doesn't apply in
22 bankruptcy. It's the Trustee's position it doesn't apply in
23 bankruptcy.

24 No one responded to that legal brief. They had an
25 opportunity to respond to it. No one responded.

1 So while I understand that there is frustration
2 among the parties related to "we don't know all the facts,"
3 the difficulty that the Trustee has is that we have given
4 opportunity -- the estate has afforded opportunity after
5 opportunity after opportunity for people to plead specifically
6 why something that belongs to the estate belongs only to them
7 and not to any other creditors, and no one's taken that
8 opportunity.

9 Now we have agreed when people identify the specific
10 account, even though we don't particularly agree with their
11 legal basis, if they've complied somewhat with what the
12 Trustee and the Court had asked them to do, we agreed to set
13 those transactions aside; and we are proceeding down, in a
14 contested matter, with those particular people.

15 But to now step back and say, "You're not going to
16 be -- you can't do anything until we set forth another set of
17 pleadings or another set of briefings related to constructive
18 trust or some state statutory lien, or a UCC filing, or, you
19 know, a simple reading of a definition of GIPSA," when it's
20 -- the facts really aren't in dispute, on addition to the idea
21 that, "You may not have known everything that the ELC did, but
22 you certainly knew what your own people did when they sold the
23 cattle; and if you had some facts or some law that supported
24 why you should recover above anybody else in the estate, then
25 you certainly had five separate opportunities to lay that

1 before the Court."

2 We also need to remember that the only thing that
3 we're trying to do is to remove -- remove these monies from a
4 separate set-aside escrow account that we kept there for
5 people to have the opportunity to say why it couldn't belong
6 to the estate and just release it into the estate. We're not
7 trying to move it anywhere else.

8 THE COURT: So to that extent is your motion kind
9 of like a 363 sale in that you would tr -- you would change
10 the character of the asset, but subject to any liens and
11 encumbrances that might exist on it?

12 MS. HALL: That's what it says.

13 THE COURT: In other words, are they prejudiced by
14 asserting a lien or a right to these monies just because
15 they've been transferred out of that escrow account into the
16 bankruptcy estate?

17 MS. HALL: Well, Your Honor, I don't think so.
18 There's a separate part under our cash use order that says if
19 we take the money anywhere else we have to, you know, do
20 something with it.

21 Now we -- we've already transferred 1.6 million
22 dollars. Nobody objected to that. And that money is being
23 used under cash use and DIP motion for operating the estate;
24 but I believe our Cattle Proceeds Sale motion said that it
25 would be -- you give us this, and it's subject to all liens,

1 claims, and encumbrances that may exist.

2 So I don't think it's going to -- I don't think it
3 prejudices anybody, but we have -- I guess there's a-- I
4 understand the frustration on the part of the cattle sellers;
5 but as far as we can tell, this was an industry that sort of
6 ran on a handshake and a trust -- and I don't mean a "trust"
7 statutorily. I just mean trust.

8 And unfortunately, the statutes and the regulations
9 don't provide an omnibus trust for everybody that deals in
10 this industry. It's just some very specific types of
11 transactions, and ones that we were not involved in.

12 THE COURT: Well, that's what they say is a legal
13 conclusion on your part, that they disagree with.

14 MS. HALL: Well, Your Honor, they had -- they had
15 five opportunities to tell us why -- to plead that in their
16 objections. But that's not what they do. They simply use
17 the term "market agency," and that's where we've come down to
18 now. Everybody agrees, I think, that we're not a packer.

19 THE COURT: Everybody agrees with --

20 MS. HALL: Or a poultry dealer.

21 THE COURT: -- you're -- whether you're a dealer or
22 a market agency, is that a determinative fact?

23 MS. HALL: The difficulty is, the term "market
24 agency" has two different definitions. "Market agency,
25 buying on commission," and "market agency, selling on

1 commission." We don't think there's any evidence that we've
2 found so far that we were ever a market agency, period. But
3 assuming that we were, we weren't a market agency selling on
4 commissions.

5 So the regulations and the statutes that they're
6 citing regarding custodial trusts applies only to a market
7 agency selling on commission. Like Superior. Like Joplin.
8 Like the auction houses. That's what an auction house does.
9 We weren't an auction house. We were simply a dealer. And
10 Mr. Akers, the CEO of Blue Grass, in his article that we
11 attached to our responses, very clearly lays that out. He
12 says that, you know, "farmers and producers, ranchers who sell
13 their cattle can sell it through a market agency like mine --
14 like Blue Grass -- and be protected by a custodial account.
15 Or you can sell it to a dealer, like Eastern. And
16 unfortunately, your only remedy is the bond."

17 The other -- the other part of this is that this was
18 in an regulated industry under GIPSA, and under the Packers &
19 Stockyards Act. GIPSA, every year Eastern would file its
20 annual report. GIPSA would come in and investigate whether
21 their bond was big enough. GIPSA never said, "You have to
22 have a custodial account." GIPSA never said, "Where is your
23 custodial account?" Eastern never had a custodial account.
24 We're a dealer. That's it. We had a bond. We were a dealer.
25 And if you dealt with us and you let your cattle go where you

1 got good funds, I'm sorry, but that's what happens when
2 dealers fail.

3 And when the bankruptcy was filed, you have to go
4 with what the law says; and the law says that we -- we, as the
5 debtor, if people owe us money it goes into the estate for the
6 benefit of all creditors; and we're not allowed to prefer --
7 although Mr. Gibson apparently did, and we'll have to address
8 that at some time in the case -- certain people, and pay them.

9 We are trying to recover for everyone, and every --
10 every person who continues to fight this and use up estate
11 resources on a very simple issue of law, its one definition,
12 is wasting the assets of the estate that could go to pay the
13 creditors.

14 So all -- we're not trying to take things away from
15 people; and, you know, the estate -- this case is kind of
16 strange because we are essentially in a claims resolution
17 process litigating in four interpleaders and in this motion.
18 And that's --

19 THE COURT: All right.

20 MS. HALL: -- essentially what we're doing.

21 THE COURT: Okay. Who wants to address this
22 issue?

23 MR. LaTOUR: Your Honor, Randall LaTour for Fifth
24 Third Bank.

25 You asked two questions I'd like to address. I'd

1 like to expand on one point that Ms. Hall made in response to
2 your question on market agencies.

3 It is not determinative of the custodial
4 characterization or trust characterization if you say that
5 Eastern Livestock is a market agency. That is, by itself,
6 not determinative. You have to determine, was the market
7 agency selling on commission, or a market agency buying on
8 commission, or something else? And the something else would
9 be a dealer or one of the other characterizations that are
10 being thrown around by some of the other creditors.

11 In addition, there are two statutory bases for
12 custodian/trust characterization under the Packers &
13 Stockyards Act, and nobody that has objected, or anyone else,
14 has ever said that Eastern is a packer or engaged in selling
15 poultry; so that leaves us solely with the basis established
16 in 9 CFR 201.42, and it says that,

17 "A payment that a livestock buyer makes to a market
18 agency selling on commission is a trust fund."
19 When you give a money to a market agency selling on
20 commission, those monies are a trust fund until you get what
21 you are supposed to buy: The cattle.

22 In today's motion we're talking about cattle that
23 got delivered and got paid for. So this 9 CFR 201.42(a) is
24 completely in apposite. So on the undisputed facts of
25 today's controversy, there is no Packers & Stockyards Act

1 custodian account or trust account issue because nobody was a
2 livestock buyer that paid to a market agency selling on
3 commission that failed to get their cattle, on today's
4 controversy.

5 There's plenty of other controversies where the
6 facts are different, but on today's controversy, we're talking
7 about cattle that got delivered and paid for, which means that
8 9 CFR 201.42(a) is not applicable. It can't be.

9 And so your first question was, "Could you resolve
10 today whether there is a statutory trust imposed by the
11 Packers & Stockyards Act?" With respect to these monies that
12 are being discussed today, the answer to that is Yes. You can
13 dispose of it because it's impossible to have a trust
14 characterization imposed because none of the three conditions
15 -- or three situations eligible are even being alleged by
16 anybody. So those are not there.

17 Now the question of, "Well, is it a small portion
18 instead of all?" Okay. These are transactions in which the
19 party who paid thought they were dealing with Eastern because
20 they had contracts with Eastern, they paid the money to
21 Eastern. And so any way you shave that to say, "Well, maybe
22 it's some, maybe it's all, maybe it's part," it's at least
23 property of the bankruptcy estate. Those monies are at least
24 property of the bankruptcy estate.

25 But if somebody's going to carve something out of

1 that, they're going to have to do it in some manner other than
2 what we're talking about today. They're going to have to file
3 an adversary of their own to determine, and they're going to
4 have to meet a burden of proof to determine that those monies
5 are not Eastern's, in the face of what is apparently the
6 agreement between Eastern and the buyer.

7 Now I am disheartened, again, to hear that the money
8 is really not going to Fifth Third, it's going into this
9 account; but it seems to me that rather than having the sort
10 of shadow boxing that's going on, we ought to take those
11 issues head on. If it goes into that account -- to answer
12 your question, "Is it prejudicing anybody in any of these
13 other proceedings?" No. It's not. "Does Fifth Third get it
14 immediately?" No, they don't. We'll probably have to have
15 the resurrection of this proceeding, you know, another -- yet
16 another time.

17 But there is really no reason today not to grant the
18 Trustee's motion.

19 MS. DELCOTTO: Your Honor, I have tried to have
20 many discussions with Ms. Hall and tried to come up with
21 common themes of fact. I mean, I hear you say month after
22 month that we need to come up with these protocols; and I
23 think all the lawyers agree with that, but we have not been
24 able to accomplish anything. So I have clients who have some
25 interest in adversaries and some interest in this money, and

1 the reason we can't grant this motion today is just a
2 fundamental 541(b), which is what is property of the estate?
3 And that has just got to be by an adversary.

4 So there have been discussions, do we need one big
5 giant declaratory judgment adversary to determine property of
6 the estate. Some of the other creditors who are frustrated
7 have tried to work up proposals of common legal issues. What
8 -- how is Eastern acting factually, which then will determine
9 what is Eastern's rights in the money?

10 Eastern called itself a broker. Fifth Third's
11 representative in state court -- which, by the way, that
12 action is still actively proceeding, which nobody in the
13 bankruptcy is even aware of -- Fifth Third has given one
14 deposition in the state court action where the witness says
15 Fifth Third thought Eastern was a broker.

16 Well, the definition of a broker is somebody who
17 buys and sells on commission; and a broker does not own 100
18 per cent of the money that passes through their hand. A
19 broker owns their commission fees.

20 So I feel like everybody's being prejudiced if you
21 grant this motion today because you're basically saying it's
22 property of the estate, and it's Fifth Third's cash
23 collateral, which then to me wipes out all the arguments about
24 what is Eastern's rights in the money? And I feel like that's
25 -- we've got procedural complexity, we've got factual

1 complexity, and we've got legal complexity, and -- I mean, I
2 know how to file ten adversaries, and I will, if that's the
3 direction the Court gives today.

4 I'd like to get some direction today about whether
5 we're going to do formal discovery, and we're going to all
6 litigate, and whoever wants to file an adversary, just file
7 it; or whether we're going to come up with some kind of
8 protocol because we've got people trying to intervene in one
9 adversary, and people saying, "You don't belong in that one,"
10 and I'm trying to figure out if somebody's going to do
11 document requests and production in an adversary, how am I
12 supposed to get my hands on those documents?

13 So I hope we can get some guidance today, Your
14 Honor, but I do feel like that this motion is just
15 procedurally improper and should be denied.

16 MR. DONNELLON: Thank you, Your Honor. Dan
17 Donnellon on behalf of First Bank. There's three points I
18 want to make, and I'll try to be brief with the Court. The
19 first is what my role is in making these -- the objections
20 that we filed; and the second will be to get to the heart of
21 the question about is this really a 363 change of character,
22 and the third is, What are we trying to accomplish with the
23 transfer of this money?

24 With respect to the first, my client objected to
25 four specific transactions, and it was my understanding that

1 the 670 -- \$680,000 of that was going to be off limits for any
2 transfer. That was the arrangement that I had with Ms. Hall
3 and with Mr. Knauer, and we had filed our August 1, very
4 specific as we could, identification of those particular
5 transactions.

6 The more recent supplemental objection we filed, it
7 was simply to draw the Court's attention, regardless of what
8 happens with those four transactions -- we are in a situation
9 where we have the cart clearly before the horse here with
10 respect to this money, the interpleader money, the money that
11 was in Eastern's account before the Receiver took over; the
12 money that was in Eastern's account before the petition was
13 filed -- it's all the same money -- it's money that was
14 collected by this broker/dealer/clearer/market agent --
15 whatever you want to call them, and it's all the same money,
16 and we shouldn't be treating any of it differently from one
17 respect to another.

18 After the last proceeding -- and probably a well-
19 deserved name -- I was given the title of "the person who
20 objects to everything," because we objected to Mr. Dietrich
21 being paid, solely because of the procedural complexity of
22 that, we're adding a new layer, and we didn't -- as I said,
23 before you, we didn't mind Mr. Dietrich getting at his
24 \$50,000. Somebody should get some money here.

25 But the problem was, to piecemeal carve out

1 individual things was what I said I objected to, and I took on
2 the mantle before Your Honor saying, "I'll start submitting a
3 protocol to get the low-hanging fruit out of the way," and I
4 tried to do that, to identify a procedure we would follow and
5 identify threshold issues we could brief. And I got one
6 response from Fifth Third that rebuffed the process, and no
7 response from anybody else. And so, yeah, I object to that
8 as well.

9 But I'm trying to move this forward in a way that we
10 can identify money and get people paid, and I'm not getting
11 anywhere with it.

12 Second, let's talk about this particular transaction
13 in itself, and why it shouldn't be treated as just a 363, is
14 what I believe Your Honor referred to. Ms. Hall said, "We're
15 trying to recover for everyone," was, I believe I tried to
16 write down as close as I could, "We're trying to recover money
17 for all creditors of the estate."

18 But the motion that was filed on May 23rd doesn't
19 say that. It says, "Nobody has any interest in this money
20 except Fifth Third. It's not that we're trying to recover
21 everybody. This motion says, 'This is Fifth Third's money,'
22 and no one has any interest in it because it's an accounts
23 receivable. All the money belonged to Eastern -- every penny
24 of it, whether it was a commission or a clearing fee at fifty
25 cents per hundredweight, or whatever else it was, it all

1 belongs to Fifth Third, and we want it transferred now."

2 And that's why we have the cart before the horse.

3 Ms. Hall referred to five opportunities for people to state

4 specific objections, and essentially saying, "We've put the

5 cart in front of the horse, and nobody's gotten the cart,"

6 because we all realize the cart's not going anywhere at this

7 point. We're talking about transferring money from one

8 account to another; and Your Honor said, "Is this just

9 changing the character and everybody's objection's preserved?"

10 And the most telling was Ms. Hall saying, "I think

11 so. We've asked to see an order that would specifically carve

12 out the concerns that several of the creditors have here, and

13 we haven't seen anything," --

14 THE COURT: Like --like -- like what --

15 MR. DONNELLON: -- "-- in that respect, so why

16 transfer it?"

17 THE COURT: What would that order say?

18 MR. DONNELLON: That's my concern is, there's no

19 real way to put that together, so why transfer any money?

20 It's all the same -- it's the same as the money in the

21 interpleader. Those are monies collected by Eastern

22 Livestock. Instead of paying them to Eastern Livestock, I'm

23 paying them to the Court.

24 THE COURT: Well, let's get to it. I mean, isn't

25 that -- is the reason we need money in this estate account to

1 operate?

2 MS. HALL: Some of it is, Your Honor. We have to
3 be able to run the case.

4 THE COURT: Right.

5 MS. HALL: So we need operating funds.

6 THE COURT: So what's going to happen if the estate
7 doesn't have money to operate? Where -- will you all go--
8 will you all go to somebody else's court and leave me alone?

9 MR. DONNELLON: It doesn't sound like a bad idea.
10 The concern is --

11 THE COURT: It doesn't sound bad here either.

12 MR. DONNELLON: And frankly, that's why I
13 personally had no problem with the 1.6 million dollars moving
14 because we realized there has to be some ability to operate
15 this estate. But what we're doing right now is we've posted
16 up on the secure website -- some, not all, but some of the
17 data necessary for these transactions.

18 THE COURT: All right. Okay. We have funds that
19 may or may not ultimately be property of the estate subject to
20 Fifth Third's lien. Those funds have been paid over to the
21 debtor by people who wanted to pay, who they thought they were
22 supposed to pay and get out of the way.

23 If this was any other case, wouldn't then somebody
24 come forward and say, "Hey, this doesn't -- this isn't
25 property of the estate. This is mine. I have a constructive

1 trust. I have a lien. I," -- you know, "this was being held
2 in trust." Whatever. And probably you're right, that would
3 prob -- usually almost exclusively be in the form of an
4 adversary which determines the extent and priority of liens.

5 So isn't that the way this would happen in a less
6 complicated case, where somebody paid some money to the
7 debtor? Let's say the debtor built a building, and the person
8 who he built it for paid the money to the debtor, and the
9 subcontractors would then come in and say, "Hey, that's not
10 all his money. Some of that is mine."

11 So what I'm getting to from a practical standpoint
12 is, if we do that in this case, how -- or keep it in the
13 current account, how are the debtor -- how are the creditors
14 prejudiced? And I guess one answer is, "Well, some of this
15 money might be used for case administration and then not
16 available to pay all the claims that might be ultimately
17 determined to be due." Is that right?

18 MR. DONNELLON: That's just one example. Another
19 example would --

20 THE COURT: All right, what's another one.

21 MR. DONNELLON: Another example would be, if we're
22 just going -- if we're going to take enough money, four
23 million dollars, to operate the estate and pay the estate's
24 professionals, what we're doing here in the process as it's
25 been proposed, is to carve up individual adversary proceedings

1 with respect to the 74 transactions. And that only took us
2 through March, so there should be -- Mr. Knauer may be able to
3 update us -- more transactions that will come forward.

4 And so now what we're doing is we're taking those
5 individual transactions, using individual adversary
6 proceedings, some at the range of 80,000 and 75,000 a clip,
7 and forcing those persons to come forward and litigate their
8 interests when the professionals are being paid out of money
9 that may end up being their money to begin with, or being
10 money that belongs to somebody else in another adversary when
11 this war of attrition is going to occur in 75 and \$80,000
12 clips, when --

13 THE COURT: Sounds kind of like an interpleader
14 action, doesn't it?

15 MR. DONNELLON: I'm sorry?

16 THE COURT: It sounds kind of like an interpleader
17 action, where the professionals get paid by the money that's
18 in the pot, and then ultimately it's determined who it belongs
19 to.

20 MR. DONNELLON: And that's precisely the reason,
21 and my third point is, why do we need to move any money at
22 this point, before some of these threshold issues are
23 addressed? And that's why I found it welcoming that --

24 THE COURT: All right. Now let me -- let me be
25 clear. Are you making the point that to handle this as we

1 would normally, as I described a moment ago -- and that is,
2 let it come in, then let people say, "This isn't yours," and
3 bring an adversary, would be a waste of money because of all,
4 you know, the multiple cases that would have to be filed, and
5 the costs associated with that; and it's just going to drive
6 up administrative expenses.

7 MR. DONNELLON: Exactly. And that's why --

8 THE COURT: Well, that's a good point, and that's
9 why I have said several times at these hearings, you know, if
10 you have particularized facts that give rise to a claim on a
11 particu -- on a certain sum of money, let the Trustee know
12 that, and we won't -- we'll segregate that, those monies.

13 But what else can we do in terms of a universal
14 resolution? I mean, are -- if we had to brief -- I mean, I
15 know several of you have suggested that we ought to brief
16 certain legal issues. What legal issue do you think, or legal
17 issues could we brief that would have some universal
18 application and help reduce the number of cases?

19 MR. DONNELLON: A few of us has tried to get that
20 together. Ms. DelCotto, I believe, has the list. We've
21 started by trying to identify what are the global issues that
22 could make this easier administratively? Such as, did
23 Eastern, acting as a broker, retain any interest in the
24 account receivable other than its commission? She has a
25 complete list, but once we have craft those, have people brief

1 them, and Your Honor decides --

2 THE COURT: Well, now that --

3 MR. DONNELLON: -- yes, to get all the money.

4 THE COURT: That -- that sounds like that's a mixed
5 question of law and fact. I mean, that's not going to be
6 resolved by briefs. I mean, you're -- everybody wants to
7 address that fact already.

8 MR. ROGERS: Sorry, Your Honor --

9 THE COURT: Mr. Rogers, I'll let you go. You
10 haven't had a chance to say anything.

11 MR. ROGERS: I apologize. I'm here on behalf of
12 Superior and Joplin.

13 Certainly, this is not a typical case. I would say
14 in part that's because what -- the Trustee filed an emergency
15 motion saying to stabilize this market we've got all these
16 different claims being made. People pay their money in. It
17 will be subject to all liens, claims, interests, whatsoever.

18 And so if an order was entered that said the fact
19 the Court's granting of the motion has no impact legally,
20 factually, equitably, or otherwise, on any lien, claim,
21 encumbrance or interest. So that having been done, the
22 Trustee is essentially kind of taking the position, "Well,
23 this is property of the estate, unless you prove otherwise."

24 And the big issue here is, the Trustee hasn't proven
25 anything. The motion that was filed, the Trustee says we

1 haven't given facts, we haven't given law, in the Trustee's
2 claims report that's not only to transfer money but that it be
3 found to be cash collateral to Fifth Third offers no evidence
4 and no law. It offers the opinion of the Trustee.

5 THE COURT: All right, so what concerns you about
6 that? I mean, what if -- what if the order ordering transfer
7 said, "to the extent that the monies are determined to be
8 property of the estate, they are cash collateral of Fifth
9 Third"?

10 MR. ROGERS: (unclear)

11 THE COURT: I mean, because that's -- that's the
12 truth of the matter, right?

13 MR. ROGERS: And that is, and I don't know if I
14 would have a problem with that.

15 THE COURT: I mean, I would not be willing to make
16 a determination in light of the controversy that exists at
17 this moment that this is property of the estate.

18 MR. ROGERS: And that is exactly, however, what the
19 Trustee has asked for.

20 MS. HALL: Your Honor, that's not --

21 MR. ROGERS: And --

22 MS. HALL: -- that's not true, John.

23 MR. ROGERS: -- I can read the motion.

24 MS. HALL: But we -- we haven't -- we haven't --
25 sorry. Let me say one thing: He -- John's correct that in

1 the beginning --

2 THE COURT: In the beginning --

3 MS. HALL: -- in the beginning, I mean --

4 MR. ROGERS: And (unclear)

5 MS. HALL: -- one of -- wait a minute, wait -- no

6 -- one of the things --

7 MR. ROGERS: Okay, the Fifth Third today --

8 MS. HALL: Well --

9 MR. ROGERS: -- said that.

10 MS. HALL: Just a second, John. One of the things
11 that's ironic here is that the Court is right -- normally
12 money comes into the estate, it's presumed to be property of
13 the estate, and it is the -- it is the duty of the people who
14 think it's not property of the estate to bring an adversary
15 proceeding and say why it's not property of the estate.

16 We thought we were doing -- and people have said
17 there needs to be a procedure to acclimate all that. We
18 thought that's what we did. We put together a procedure
19 whereby, "Here's all the money we've brought in from people
20 who owed us money. You think you may have a claim to it.
21 Here is a procedure for you to follow so that we don't have to
22 file adversary proceedings to get money turned over to the
23 estate, and you don't have to file adversary proceedings
24 against us, so that we don't have multiple adversary
25 proceedings."

1 So we gave them the procedure, we set up the
2 process, and now we're being asked to set up yet another
3 process, when people have had ample opportunity.

4 MR. ROGERS: Because --

5 MS. HALL: Now it is true --

6 MR. ROGERS: Because --

7 MS. HALL: -- it is true --

8 MR. ROGERS: -- the Trustee did not set up a
9 process.

10 MS. HALL: We did.

11 MR. ROGERS: The Trustee filed a motion which said,
12 "In the Trustee's opinion nobody but Fifth Third has a valid
13 claim to these funds." That's all the motion says. Not one
14 bit of evidence, not a citation to a case, to a statute,
15 anything.

16 THE COURT: All right. Well, let's come forward
17 in time to where we are today, and if the -- if the Court
18 orders -- would grant the motion in terms of transferring the
19 money into the bankruptcy estate, we could then proceed in a
20 couple of ways. We could still have some sort of procedure
21 whereby the Court will resolve certain legal issues: For
22 example, whether the debtor is -- was a market agency selling
23 on commission, and so -- and if so, subject to holding money
24 in trust in behalf of certain parties.

25 I mean, I would assume that there could be some

1 facts on that question, but that's primarily a question of law
2 and documents, right? Everyone -- don't you think there's a
3 lot of facts involved there?

4 MS. DELCOTTO: I do, Your Honor. The cattle
5 lawyers tell us that it's course of dealing, what did the
6 people intend, what was the relation between Eastern and its
7 customer, so it goes beyond the documents factually.

8 MR. ROGERS: The problem is that Eastern --

9 THE COURT: Well --

10 MR. ROGERS: -- Eastern could be one of those
11 things, on one occasion, with one party; and I think the
12 difficulty is -- we've got a case here --

13 THE COURT: Well, then --

14 MR. ROGERS: -- where everybody agrees.

15 THE COURT: -- then it seems to me, Mr. Rogers,
16 that you're saying do these things need to be resolved
17 individually in maybe seventeen different adversary
18 proceedings because the facts are different in each case.

19 MR. ROGERS: Unless -- and the only qualification I
20 think to that is, if the Trustee and the bank put on evidence,
21 cite the law, and say, "Based on these facts, we're entitled
22 to these funds, this is property of the estate," then I think
23 we have an issue that -- that we can determine whether it has
24 to be addressed or not. But the Trustee has filed a blanket
25 objection and says --

1 THE COURT: All right.

2 MR. ROGERS: -- "I think none of you have claims."

3 THE COURT: Well, maybe -- go ahead -- well, I
4 think maybe part of the problem we're having here is that
5 we've been trying to find a different way to do things, and,
6 you know, the parties have not been able to do that; and so
7 I'd say as a Judge, we'll do things the way we always do
8 things: And that is, I'm going to grant the motion, you pay
9 the money in. Anybody has a claim against those funds, bring
10 your -- bring your adversary.

11 Now it may well be that you can have an adversary
12 that you think illustrates a lot of the issues that could
13 resolve several cases; and I'd be willing -- I don't know that
14 we're into any statute of limitation problem at this time. I
15 don't think we're close, but I'd be willing to extend statutes
16 if you want to litigate, find a primary vehicle.

17 But if, as Mr. Rogers says and even as I hear some
18 from this table saying some of the cases are different, and
19 Eastern may have dealt differently with a party in one
20 instance than they did in another, then I don't know it's
21 going to do much good to reach a universal -- find a universal
22 truth, because it might not be universal.

23 I will say that if the parties want to continue
24 their discussions and they think that -- that they do have a
25 question of law that would be broadly applicable, I'm willing

1 to decide a question of law on the -- being submitted on
2 briefs, and I -- if a party wants to do that -- either do it
3 by agreement or come forward with a motion, I'm still open to
4 that suggestion. But it's not going to do me any good to
5 reach a conclusions of law and then have a party come forward
6 and say, "Well, in my case the facts are different, so that
7 doesn't apply to me."

8 Yes, Mr. Latour.

9 MR. LaTOUR: Your Honor, I agree with you that it's
10 inescapable that this will end up being resolved by adversary
11 proceedings. The parties are working hard, however, to
12 figure out pursuant to Rule 7042 a way to address common
13 issues of facts, common issues of law. The wait has been for
14 the pleadings to close. Now that there are going to be
15 additional adversaries, there may be some additional delay in
16 that.

17 I have been trying to chart the topics that are
18 involved. I'm now up to page 5 on the spreadsheet, of the
19 various topics that are potential candidates; and once
20 everybody's cards are on the table about what their theories
21 are, we may be able to suggest a batting order of potentially
22 dispositive issues. That is being worked on. That time line
23 just extended because of the ruling that you're going to make
24 today.

25 THE COURT: All right.

1 MR. LaTOUR: There has also been a discussion
2 amongst the parties in the interpleader actions on how to deal
3 with evidentiary issues, and so the comment that I squashed it
4 is inaccurate. What I said was, "Are you aware of the Rule 16
5 conversation that outlines what went on before," and gave him
6 a copy of it, that discussion is still going on because of the
7 electronic stored information issues involved, but that is
8 also being worked on.

9 But it is inescapable that you're going to have to
10 decide a series of adversary proceedings on factual
11 determinations on -- I pray not -- but close to transaction by
12 transaction because of the possibility that Eastern was one
13 thing in one transaction and something else in another
14 transaction; and that's what we're going to have to do.

15 But I do want to go to the one point that you made
16 about running the case, because if money gets transferred out
17 of this escrow account into the operating account and then it
18 gets spent, my client's cash proceeds, from my point of view,
19 is being dissipated; but I'm not getting any adequate
20 protection payments at all. And part of that was a two
21 million dollar post-petition loan, which is certainly not
22 objectionable by anybody because it's post-petition and it's
23 new money.

24 So if there is a question of transferring some money
25 to the case so that it should be -- that it can operate, that

1 two million dollar payment ought to be made, at least.

2 MR. ROGERS: If it's -- it's not part of your
3 collateral, if it's not property of the estate.

4 MR. LaTOUR: Then it's inures to the benefit of
5 your client, and your guy should pay. You owe me two million
6 dollars.

7 MR. ROGERS: You know, my feeling is it's
8 unfortunate the Trustee has handled it in this fashion, by
9 making an omnibus objection and offering no evidence, and
10 taking several months to do it; but that isn't our fault. And
11 it prejudices all of our claims to say, "Well, let us pay it to
12 Fifth Third, and let us use it to operate the case."

13 At that point, where did our rights go? What are we
14 fighting over?

15 THE COURT: Well, I'm not going to --

16 MR. ROGERS: You're using the funds.

17 THE COURT: I'm not going to determ -- there's no
18 motion in front of me to pay anything to Fifth Third as far as
19 I'm concerned, and I'm not going to consider it today.

20 MR. DONNELLON: May I briefly be heard on one
21 issue, Your Honor?

22 THE COURT: Yes.

23 MR. DONNELLON: Well, it's -- I'm sorry, to what
24 you said: transfer the money. We do have a carve-out I
25 believe still exists for the four transactions that we have at

1 issue.

2 THE COURT: If that's the deal you all have, that's
3 the deal you have.

4 MR. DONNELLON: The problem is I see from what Mr.
5 Rogers was saying is -- and to use your example, the building
6 being built -- why wouldn't it be the burden of proof in the
7 first instance on the Trustee to say, "This is money of the
8 estate that I am collecting," before it gets transferred
9 (unclear)."

10 THE COURT: Why are you -- why are you in any
11 different position as to that point when it's in an escrow
12 account controlled by the Trustee or in the Trustee's account?
13 I mean, it's still there, and you're going to have to go get
14 it in some way. It's not in your possession. It's not in
15 your bank account.

16 At some point, if you want to remove it from the
17 account that it's in and have a check written to you, or your
18 client, or anyone, somebody's going to have to come forward
19 and show something, right?

20 MR. DONNELLON: Absolutely. And my concern is
21 only moving it from one account to another, Mr. LaTour is
22 saying he wants to grab two million of it as a loan.

23 THE COURT: I haven't let him grab two million yet,
24 though, have I? I mean, people will want a lot of things.

25 MR. DONNELLON: I will be seated.

1 MR. PLOURDE: Your Honor, might I chime in here
2 for a moment?

3 THE COURT: Yes.

4 MR. PLOURDE: (telephone transmission sometimes
5 unclear) This is Ross Plourde on behalf of Stockman Oklahoma
6 Livestock Marketing, Brent Kuehny, and Crumpler Brothers.

7 Ms. Hall indicated that -- I'm sorry. Ms. Hall
8 indicated that she had briefed the issue of constructive
9 trust, and nobody responded. Actually, we did -- we responded
10 to the Trustee's motion in the first place, briefing the issue
11 of constructive trust, and they responded to that. We've
12 established a briefing schedule pursuant to a scheduling order
13 by the Court, (unclear) that and some other issues, and I
14 would hope that any ruling of the Court would apply to
15 abrogate that -- that agreed scheduling order that's already
16 been entered, that governs that issue.

17 MS. HALL: Your Honor, this is -- Ross, this is
18 Terry. With those -- I can't remember if it's four, five, or
19 six people that we have made agreements with, including Mr.
20 Donnellon's client, to either segregate specific accounts or
21 set up specific issues for further determination, because you
22 responded with particularity we will honor those agreements,
23 and those accounts and those issues will proceed down their
24 normal path that we've agreed to.

25 MR. PLOURDE: Thank you.

1 ATTORNEY: Your Honor --

2 MR. NEWBERN: Your Honor, this is -- Your Honor,
3 this is Scott Newbern, if I may speak briefly for the Florida
4 creditors.

5 THE COURT: You may.

6 MR. NEWBERN: Can you hear me?

7 THE COURT: Yes.

8 MR. NEWBERN: Thank you. We responded to the
9 objections specifically and indicated, at least in our
10 instances, as we were dealing with Eastern for the most part
11 as a clearing agency, that the monies that we were owed were
12 not part of the bankruptcy estate, and we've been objecting to
13 any move out of this suspense account, if you will, or
14 whatever account, to place funds into the trust operating
15 account -- Trustee's operating account, and have it dissipated
16 with the fees. Because we were one of fourteen clearees
17 across the country, where our client is one of fourteen, and
18 (unclear) don't know how much money was involved in a similar
19 situation. That was our objection.

20 Now from what I've heard already today is that we
21 need to proceed in adversary proceedings for all of this, I
22 understand that. I believe that Ms. DelCotto has a proposed
23 order or at least some legal issues that may help consolidate
24 matters, and certainly we would like some guidance on that.

25 MS. HALL: Mr. Newbern is one of the ones that we

1 have an agreement with to set aside certain accounts and not
2 transfer. Most of his client's money is caught up in the
3 Kansas interpleader, I believe.

4 ATTORNEY: Wisconsin.

5 MS. HALL: Wisconsin interpleader?

6 MR. NEWBERN: About half -- about half of it's in
7 the interpleader, Your Honor, out of Wisconsin; and the other
8 half -- the debtor's half of it came in via a payment from a
9 Lynn Miller who --

10 MS. HALL: Right.

11 MR. NEWBERN: -- (unclear) but then there's a whole
12 series of five or six others that are listed as asset accounts
13 receivable on the claims report, the monthly report, that have
14 already paid for cattle directly to the sellers; and if
15 anything, Eastern's only claim will be for the commission as
16 clearing agency, even though they didn't clear the account.

17 MS. HALL: Mr. --

18 MR. NEWBERN: (unclear) that's a separate issue,
19 but it's part of the same legal concept (unclear).

20 MS. HALL: It is -- it is a separate issue. Mr.
21 Newbern is speaking about the receivables listed on the
22 operating report filed by the Court -- I mean, filed by the
23 Trustee that says we have not collected these receivables.
24 We have not collected those receivables. They're going to be
25 in controversy at some point. We will agree to set aside the

1 account that Mr. Newbern's -- of Mr. Newbern's client, not in
2 general for anybody who's a clearee. So that particular
3 account we're setting aside.

4 The other accounts we haven't collected and are not
5 part of this motion yet, so he should be okay.

6 THE COURT: Did you hear that, Mr. Newbern? That
7 you should be okay?

8 MR. NEWBERN: I did, and I understand that the
9 money has been set aside, and if we're successful, we get it
10 all undiminished from operating costs to the trust estate.

11 THE COURT: Right. As to the money that's been set
12 aside, yes.

13 MR. NEWBERN: Yes -- Yes, Your Honor.

14 THE COURT: Yes. That's correct. All right. I
15 want to move past this motion. Is there anything further? I
16 -- I --

17 MS. HALL: The only thing is how to get an order.
18 Do you have a process?

19 THE COURT: You mean how we're going to draft an
20 order that people want to object to? Well, let me give you
21 some guidance.

22 I -- I want it to be as simple as possible and at --
23 and not include conclusions as to the estate's ultimate
24 entitlement to this -- to these funds. I don't mind if it
25 says that to the extent that it is subsequently determined

1 that as property of the estate it's subject to Fifth Third's
2 lien.

3 But I want it short and sweet because I don't want
4 you to try to -- I don't want you to try to put in legal
5 conclusions that refute any of the arguments about market
6 agency or dealers or anything like that in the order. I don't
7 -- there's no way we could write an order that would -- and we
8 really -- I've really decided here today not to resolve all
9 those things, that resolution of all those things is not
10 necessary for this particular transfer.

11 MR. ROGERS: I --

12 THE COURT: Mr. Rogers.

13 MR. ROGERS: I might briefly add one thing to that
14 list, in trying to clarify the order. The constructive trust
15 issue, it's -- the Trustee's counsel has made the argument of
16 why didn't anybody respond to this issue?

17 We just didn't respond because we had cited a number
18 of cases supporting it, and the Trustee's brief itself says
19 there's a split of authority on this, and they relied on a
20 Sixth Circuit case that they liked.

21 So, yeah, there really wasn't a need to respond to
22 the brief because what it stands for is the proposition that
23 courts are undecided.

24 THE COURT: Well, I'm a little -- what do you want
25 her to --

1 MR. ROGERS: I just want to-- I feel like the
2 constructive trust issue, along with all the others, is --
3 remains an open issue.

4 THE COURT: I don't want to put in the order
5 everything that remains an open issue.

6 MR. ROGERS: All right.

7 THE COURT: It would be a very long order.

8 MR. ROGERS: I understand, Your Honor. I just
9 wanted to make clear, that was part of it.

10 THE COURT: I understand your position.

11 MR. ROGERS: Thank you. Yes, Mr. LaTour.

12 MR. LaTOUR: Just a question, Your Honor. I think
13 I understand you to say that the motion is granted with the
14 limits that you've just mentioned. Can the estate spend any
15 of that money on running the case; and if they are doing so,
16 where does my -- where does Fifth Third stand with --

17 THE COURT: Does the --

18 MR. LaTOUR: -- with respect to that?

19 THE COURT: Does the estate need to spend any of
20 the money to run the case?

21 MS. HALL: Well, plus, Your Honor, at this point
22 the only money that we have authorized, have been authorized
23 to spend is two million dollars in carve-out, and two million
24 dollars in loans, is that right?

25 MR. LaTOUR: That is correct.

1 MS. HALL: So I think we are -- I think we're past
2 the 1.6 that's been transferred; so, yes, the answer is Yes.

3 MR. LaTOUR: Well, the reason for my question, Your
4 Honor, is that once they put the limit on the prior use of
5 cash collateral order, they'll then be in the non-consensual
6 use of my client's cash collateral, and I don't want to allow
7 that. So --

8 MS. HALL: So we may (unclear, both speaking at the
9 same time)

10 MR. ROGERS: And has that been proven to be their
11 cash collateral. These are sums that were paid into escrow --

12 THE COURT: I -- I don't know. I mean, what's your
13 response?

14 MS. HALL: Well, the way (unclear) make it tee'd up
15 is when we attempt to pay back the loan, is that right? Or is
16 that -- you're taking it past the post-petition DIP loan?

17 THE COURT: I don't understand your question, Ms.
18 Hall.

19 MS. HALL: I'm not sure I do either.

20 THE COURT: Well --

21 MS. HALL: (unclear, multiple speakers)

22 MS. DELCOTTO: Your Honor, the rest of us don't
23 even know if this loan's been funded. We don't know what's
24 being spent. We're behind on monthly operating reports. We
25 don't get to see the budgets. The bank and the Trustee talk

1 every week and go through the budget, and the rest of us don't
2 even have the budgets.

3 Are we saying that we funded two million dollars and
4 we spent a million six so we're past 3.6 million, and we need
5 more money?

6 MS. HALL: The operating reports explain what's
7 been spent in the case, and I know we may be a week behind,
8 but we are not months behind in filing these operating
9 reports.

10 It is -- the only money to run this case, Your
11 Honor, are what we collect and put into the property of the
12 estate, and it's highly likely that some of these accounts
13 that are being moved over from escrow to operating will be
14 used to fund the case.

15 THE COURT: Well, I mean --

16 MS. HALL: Will all of it be used? No.

17 THE COURT: I guess the question is, first of all I
18 don't know where you stand in terms of your cash use agreement
19 with Fifth Third. I mean, I assume you two know that. I
20 don't have the slightest idea, as I sit here, where you are in
21 terms of that budget.

22 MR. LaTOUR: Well, Your Honor, it does not have a
23 temporal limit, but it has a dollar limit; and so when they
24 exhaust -- they've already exhausted, I believe, most of the
25 carve-out and are spending some of the DIP lending portion of

1 it. When they exhaust the four million they are out of
2 authority to use Fifth Third's cash collateral.

3 I noted a tendency in this room that everybody is
4 perfectly willing to let Fifth Third's cash collateral to be
5 used when it's being spent, and completely against the idea
6 that Fifth Third is going to get any payments back. But
7 Fifth Third's money that is spent is not being adequately
8 protected. It's being dissipated.

9 THE COURT: Well, I understand that, and, you know,
10 as I said -- and I -- you know, I was -- spoke a little bit in
11 jest about your wanting to be paid, and that's not been
12 determined. But I mean, obviously, this case has to be
13 funded, and, I mean, I said this earlier, again, kind of in
14 jest; but, I mean, if we can't fund the case, we can't have a
15 case.

16 The -- maybe that would make a lot of people happy
17 and they could back to fifty other courts and fight about
18 these issues, but it kind of makes sense -- or at least
19 Congress thought so -- to bring everybody into the same room
20 and see if we can't resolve things in this forum. But it's
21 got to be paid for, and it is true that so far Fifth Third is
22 the only source of that payment.

23 Now obviously I know some of you will say that, you
24 know, whether their liens are valid or anything else hasn't
25 been determined, and that's true. Well, no, no, no. That's

1 not true. The -- as far as the debtor is concerned, the --
2 but their priority on -- as to claims to certain funds has not
3 been established.

4 The -- but the issue here is, you know, if we're
5 going to go forward with this case -- I mean, I do think that
6 some of the comments that various counsel have made today is,
7 we need to find ways to do so economically. It's very
8 difficult with this many parties and this many different
9 claims, as we found, to try to do anything that can cover
10 everyone or blanket a lot of issues. I haven't given up on
11 that, but we found it difficult.

12 The -- the debtor and the bank are going to have to
13 reach agreement as to cash use, as they have. They'll have to
14 reach agreement as to continuing cash use. They'll have to
15 come forward and seek to have that approved; and the parties
16 that object to that will have to object, and we'll have a
17 hearing. That's really about all I can say in that regard
18 today. I don't have it in front of me.

19 As far as -- I didn't say that this money was
20 transferred into anything other than the debtor's normal
21 account, so I did not put any restrictions on the debtor's use
22 of monies today. If the parties think there should be, they
23 can come forward. If the bank thinks they need an adequate
24 protection payment today or tomorrow or soon, they can come
25 forward very quickly.

1 MR. LaTOUR: Your Honor, you've previously ruled
2 that the money -- the proceeds of the liquid -- I'm sorry.
3 I'm starting to sum up.

4 You previously ruled that Fifth Third has a blanket
5 lien on the property of the estate, and that the liquidation
6 of those prop -- or of that property turns into cash
7 collateral subject to that finance order. And so to say that
8 the money could be handed over and that it's just not subject
9 to that order is not right.

10 THE COURT: I didn't say it wasn't -- I retract --
11 I stopped myself in mid-sentence a moment ago, to not say that
12 there was not a termination that you had a lien on the cash
13 collateral.

14 MR. LaTOUR: All right, well, then I -- I
15 apologize. I apparently misunderstand where we were going.

16 THE COURT: It got -- it got you excited, but I
17 corrected that. I'm just -- I'll -- the only question mark
18 hanging over that is other parties' claims that it's not
19 property of the estate. The same thing we've been talking
20 about all afternoon.

21 MR. ROGERS: Part of the dilemma we have, Your
22 Honor, is -- is, you know, those of us making those arguments,
23 if it's used by the Trustee because the budgets are secret, we
24 don't even know what is being used and when or how.

25 THE COURT: All right. All right, what about more

1 transparency in terms of the use -- on cash use.

2 MS. HALL: I think the reasons the budgets are
3 secret is because the estate is pursuing litigation in certain
4 parties, that we'd rather not -- or preparing litigation in
5 certain parties that (unclear) not sure why -- it's in the
6 operating reports, it says exactly -- I mean, it says how much
7 professionals are getting paid, it says how much ESI is
8 getting paid --

9 MR. ROGERS: Oh, but we see after the fact what's
10 -- what's been paid --

11 MS. HALL: It's --

12 MR. ROGERS: -- or incurred.

13 MS. HALL: -- it's, I don't know, fifteen days
14 later? Twenty days later. I mean, what -- do you want pre-
15 approval?

16 MR. ROGERS: Well, (unclear)

17 MS. HALL: I don't think that was the plan.

18 MR. ROGERS: Well (unclear)

19 MS. HALL: I don't -- how much more -- I don't
20 know. That's probably up to the bank, I mean (unclear)

21 MR. ROGERS: I mean, there's a creditor --

22 MS. HALL: (unclear, both talking at the same time)

23 MR. ROGERS: -- if we're saying it's not property
24 of the estate but the Trustee is --

25 MS. HALL: But you haven't (unclear)

1 MR. ROGERS: -- spending it, and -- and right now
2 the professional fees incurred are something like two and a
3 half million dollars, and for the most part we have no idea
4 what for, it -- it's -- it's not hard to imagine that, you
5 know, we may be losing a lot of the money we're fighting
6 about.

7 THE COURT: You mean you can't tell from the
8 operating reports what they're spending money on?

9 MR. ROGERS: Not in specific terms, no.

10 THE COURT: What do you mean by that?

11 MR. ROGERS: It's sort of a cash-in/cash-out report
12 and "professional fees incurred," but we don't know for --
13 what litigation is the Trustee pursuing? Is it --

14 THE COURT: Well, I assume that the -- as far as
15 professional fees, the debtor's attorney -- I mean, the
16 Trustee's attorneys are keeping their time like in any other
17 case, and there's time sheets that support the professional
18 activities, right?

19 MR. ROGERS: Yes --

20 MS. HALL: And we file fee applications.

21 MR. ROGERS: Yes, Your Honor. That is-- that is
22 certainly true as to that.

23 MR. LaTOUR: Your Honor, fee applications were
24 filed and were available for review; and monthly reports are
25 filed. The reason for the budget secrecy, as I understand

1 it, was the Trustee's desire not to let people who are about
2 to be sued know that the Trustee was coming. And I think
3 this is sort of a red herring discussion because you should
4 really pick what assumption do you want to make. Do you want
5 to assume that it's property of the estate or do you want to
6 assume that it's not?

7 The Bankruptcy Code answers that question for you.

8 MR. ROGERS: We have a court order here that says
9 it's not assumed to be anything.

10 MR. LaTOUR: I have a court order that says a lot
11 of things, and so far I haven't got one paragraph of it
12 enforced yet.

13 MR. ROGERS: Well --

14 THE COURT: Now let me -- let me say, Mr. Rogers,
15 that I said the court order should be silent on certain
16 things, but I have ordered the money paid into the Trustee's
17 account, and I have said that probably parties that have
18 claims in that are going to bring adversaries, so you can draw
19 whatever conclusions you want as to what presumptions might
20 exist.

21 MR. ROGERS: Well, I think what's sort of in the
22 background here that maybe ought to be brought forward is,
23 that under the existing financing order, anything that the
24 Trustee has on hand that is not -- that is under its current
25 budget and projection has to be promptly surrendered to Fifth

1 Third.

2 We don't know what the projections are; we don't
3 know what the budget are. Yes, they will give us a notice of
4 that, but I assume that's going to happen in a week or two,
5 and we'll be back here.

6 But that, at least, is what the existing order says.
7 And so it becomes kind of crucial to decide, is this property
8 of the estate?

9 MR. LaTOUR: But, Your Honor, I return to the
10 Bankruptcy Code, Section 541 says if the estate has any
11 interest in monies, that those monies are property of the
12 bankruptcy estate. So we don't have to speculate are the
13 monies property of the bankruptcy estate or not? The answer
14 is Yes, by definition.

15 Now if they have claims against that, they can
16 assert them. You've already instructed them how to do, and I
17 bow to the inevitable: There'll be another round of
18 adversary proceedings.

19 So there really isn't --

20 THE COURT: All right, I --

21 MR. LaTOUR: -- an argument.

22 THE COURT: All right, I'm tired of this motion.

23 Let's move on to the next one. Motion to quash. Is there
24 still any -- still any dispute as to that motion, or has that
25 been resolved?

1 MS. SCHUTTE: (low-volume telephone pick-up) Your
2 Honor, this is Margaret Schutte on behalf of the USDA. We
3 received a (unclear) request on August 5th, and under the
4 federal regulations the USDA has twenty days to respond to
5 that. My understanding is they have already responded in
6 part, and it's their intention to respond to the remainder of
7 the outstanding requests by the end of the week.

8 THE COURT: All right. So should we just put this
9 on for the next omnibus date to see if there's any remaining
10 dispute?

11 MS. SCHUTTE: That would be appropriate, Your
12 Honor.

13 THE COURT: September 28th at ten a.m.

14 MS. SCHUTTE: I'm sorry, Your Honor. Could you
15 repeat that?

16 THE COURT: September 28th, at ten a.m.

17 MS. SCHUTTE: Great. Thank you.

18 THE COURT: Next we have a motion to approve lease.

19 MS. HALL: Yes, Your Honor. This is the Trustee's
20 request to approve a month-to-month lease with Republic Bank
21 (unclear, not near microphone; ambient noise in courtroom;
22 loud door banging shut; beep phone conference disconnects
23 interfering with audibility) No objections were filed, and
24 we'd ask that it be granted.

25 MR. MORRIS: Allen Morris on behalf of Republic.

1 It was (unclear) negotiations it's a month-to-month lease,
2 Your Honor (unclear) Trustee beyond one month.

3 THE COURT: All right. I'll grant the motion.

4 MR. MORRIS: Thank you, Your Honor.

5 THE COURT: Submit -- submit an order. Is some --
6 one of you going to submit an order?

7 MS. HALL: We will, Your Honor

8 THE COURT: All right.

9 MR. MORRIS: Thank you, Your Honor.

10 THE COURT: All right, in related matters there's
11 --- in the Thomas and Patsy Gibson case, First Bank & Trust
12 motion for examination and production of documents, 2004 exam.

13 MR. DONNELLON: Your Honor, we ask that that be
14 continued. We are discussing with the Gibson Trustee and Your
15 Community Bank an agreed resolution of that, and there's been
16 no status change. That was Friday we discussed that, and I --
17 counsel for Community Bank, I informed them that we were going
18 to inform the Court that this will continued; he agreed, and
19 he's not in attendance, so I assume that will be just
20 continued to the next omnibus?

21 THE COURT: Yes. September 28th, ten a.m.

22 Also, in the Thomas and Patsy Gibson matter, there
23 has been a motion to extend time to file complaint to
24 determine dischargeability, filed by Bret Clement on behalf of
25 the First Bank & Trust Company. And a motion to extend time

1 to file complaint filed on behalf of the Trustee of the--

2 MS. HALL: Well, I think both the Gibson Trustee
3 and the ELS.

4 THE COURT: The Gibson Trustee and the Eastern
5 Trustee.

6 MR. LaTOUR: Your Honor, in addition, Fifth Third
7 also filed a similar motion.

8 THE COURT: You did file a similar motion.

9 COURTROOM DEPUTY: (unclear)

10 THE COURT: I'll grant those motions if the -- if
11 your note-- if the motion has already been noticed out we'll
12 wait for the notice time to run, but I'll see that all the
13 motions are granted.

14 East West Trucking, there's been a motion by
15 Cattlemen's Feed Lot for relief from stay. I think there's
16 an agreed continuance.

17 MS. HALL: There is, Your Honor.

18 THE COURT: So we'll continue that to the 9/28 ten
19 a.m. omnibus date. There's the Trustee's motion to pay
20 priority claims.

21 MR. TRAPP: Chris Trapp here for the Trustee,
22 Judge. The Trustee has about \$78,000 in priority claims for
23 earned by unpaid wages. He's got plenty of cash to pay any
24 claims that have priority over that but wants to get the
25 earned but unpaid wages paid out right away.

1 THE COURT: I'll --

2 MR. TRAPP: We have no objections to it.

3 THE COURT: I'll grant that motion. Submit an
4 order.

5 MR. TRAPP: Will do.

6 THE COURT: Motion for determination of tax
7 reporting requirements filed by the Trustee.

8 MR. TRAPP: That's also our motion, Judge. The --
9 this is a single -- East West Trucking is a single-member LLC.
10 That member was Mr. Gibson. His membership interests were
11 abandoned by the -- by the bankruptcy Trustee presiding over
12 Gibson's individual case. Essentially the -- prior to the
13 bankruptcy petition, the (unclear) preparing and filing all
14 the tax returns, there's a Form 1065 that the IRS created for
15 partnerships, the informational form that the LLC needs to
16 file, we're looking for an order that things are going to
17 continue in the status quo; that the informational forms don't
18 have to be filled out by the Trustee, but they'll be filled
19 out as part of the obligations of Mr. Gibson.

20 MS. CARUSO: Your Honor, Debbie Caruso.

21 THE COURT: Yes.

22 MS. CARUSO: The only qualification I would put to
23 that in any order that was entered, that that is specifically
24 directed to Mr. Gibson individually and not the Gibson entity.

25 MR. TRAPP: Yeah, we, of course --

1 THE COURT: All right, I'll grant that motion.

2 MR. TRAPP: Thank you, Judge.

3 THE COURT: All right, into the adversary
4 proceedings. The first matter is the Downs case. Trustee
5 vs. Willie Downs.

6 MR. TONER: Kevin Toner for the Trustee, Your
7 Honor. We'll be amending that complaint to add a couple
8 secondary transferees. The defendant hasn't answered yet, by
9 agreement. An answer I'm sure can be done quickly. We've
10 been cooperating in exchange of informal information and
11 discussion the claims, but I would just continue that, I
12 think, until the next omnibus.

13 THE COURT: All right. We'll put it on 9-28 at
14 ten a.m. Superior.

15 MS. MOORE:

16 Yes, Judge, Christie Moore for Superior. We have a couple
17 of things on the Court's agenda. To quickly talk about the
18 issue of consolidation that I think was kind of a hold-over
19 from some previous motions, Superior and Mr. Toner we've been
20 working very hard on the two documents that we thought might
21 help coordinate some discovery and get things moving for
22 purposes of that area.

23 We've circulated at least amongst counsel for the
24 Superior AP both a confidentiality stipulation that will work
25 for the parties, as well as a protocol; and those are very,

1 very close to being approved, at least within this group of
2 counsel. I think that the discovery protocol is waiting for
3 Mr. LaTour's business folks to take a peek at it, but it
4 basically provides a really nice approach to streamlining some
5 of the discovery, and we seem very pleased that it'll work
6 easily.

7 At that point that I think we would like to do, with
8 the Court's approval, is bring both of these documents to the
9 Court and ask the Court to approve them and provide simply a
10 notice time for everybody through the bankruptcy to -- so that
11 we don't spend weeks and weeks waiting for responses. We
12 think that if we -- if these five or six lawyers present them
13 to the Court, that maybe the Court can then, through the
14 bankruptcy, ask for objections if there are any.

15 THE COURT: All right.

16 MS. MOORE: And we should have those within the
17 next five days or so, depending on Mr. LaTour's folks.

18 MR. TONER: These protocols, Your Honor, were
19 written with an eye towards global application. As we
20 already heard today from Ms. DelCotto, there's a lot of
21 interest in getting documents easily. What we envision is an
22 FTP site where electronic information could be deposited at
23 nominal expense. Those signing off on confidentiality
24 stipulation would then be given access to download the
25 discovery materials.

1 Those parties who aren't comfortable with posting
2 their things would take on the responsibility of service and
3 dealing with all the interested people, but those who want to
4 use the Trustee's FTP site to make things available would have
5 that advantage.

6 THE COURT: That sounds good.

7 MS. MOORE: And we would also, of course, as part
8 of the understanding is that parties would not be given the
9 password to the FTP site and to have access to it unless they
10 sign off on the confidentiality stipulation, just to protect
11 all the parties going forward. So it would not be a public
12 site.

13 THE COURT: Okay.

14 MS. MOORE: So I think those -- that's going to get
15 us a pretty far way (sic).

16 I think the only other issue that we have that we
17 really need to talk about today is the objection to the motion
18 to amend, and we did file that motion on behalf of Superior,
19 Your Honor. We did it because we believed that the motion to
20 amend kind of put a spotlight on some of the flaws of bringing
21 these parties in, given the fact they weren't parties, and
22 they're not a counterclaim.

23 We just wanted to bring that back to the Court's
24 attention. We also have some concerns more on a logistical
25 area that we want to be able to present issues of law that are

1 unique between Superior and the debtor as soon as possible,
2 and we want to make sure that the addition of these parties
3 doesn't prolong the period of time that we're all waiting.

4 And so we believe that again we just want to make
5 our position known on the fact that this really -- they're not
6 necessarily parties. We understand the Court's inclination to
7 bring them into this AP, but just wanted to kind of bring
8 these issues back to the forefront, given the fact that the
9 clerk couldn't issue the summons because they weren't truly
10 counterclaim defendants.

11 MR. TONER: The motion is the Trustee's, Your
12 Honor, to amend the pleadings, and formally add the same
13 counterclaim defendants with the label "third party
14 defendants" so that our ECF system can properly issue
15 summonses. The counsel for all those parties have agreed to
16 accept service, because we've raised this in the last
17 successive omnibuses. We are trying to move it quickly, Ms.
18 Moore; and at that point the pleadings will be quickly closed,
19 and they'll be off to briefing.

20 But there's no additional reason I saw in the
21 objection that was filed that Your Honor didn't deal with last
22 month when he allowed those parties to come in as proper
23 parties to answer whatever interests they have as to whether
24 these things are assets of the estate or not, the stuff that's
25 in the possession of Superior, the contracts that Superior

1 seeks judgments about.

2 These -- these new pleadings are no different except
3 that it makes clear that these folks are very interested in
4 the declaratory relief that's been sought and in the attendant
5 belief that might result in this -- in this proceeding.

6 THE COURT: All right. Well, I'm going to stay
7 consistent with what I said last month and let them in, so
8 I'll grant the motion for leave to amend and overrule the
9 objection.

10 MS. MOORE: Thank you, Judge.

11 (Pause)

12 MR. SMITH: I'm sorry. This is Jim Smith. I
13 represent Diamond B Ranch. I could not hear the Court's last
14 comment, and I think (unclear telephone transmission)

15 THE COURT: Um --

16 MS. MOORE: I think he said you're going to be
17 consistent -- I heard the word "consistent."

18 THE COURT: I granted the motion. Did you hear
19 that?

20 MR. SMITH: Yes, Your Honor. That's where I lost
21 you. I'm sorry.

22 THE COURT: All right, we'll we're just talking
23 about --

24 MR. SMITH: (unclear garbled telephone transmission)
25 have to speak closer to the mike.

1 THE COURT: All right. Well, the Courtroom Deputy
2 was just asking me how we're going to issue the summonses, so
3 are they just going to file appearances?

4 MR. TONER: Some have already done that, over
5 objections of Superior. The -- if summonses are necessary,
6 we thought the matter was addressed by calling them also
7 third-party defendants, with us filing a third-party complaint
8 so that the folks who have set up the ECF system could have a
9 complaint on file.

10 THE COURT: So they -- just -- we don't need a --
11 we don't need a summons for anything that, if a lawyer is
12 coming in and appearing. If they're not, then you talk to
13 the Clerk's Office about issuing a third-party summons.

14 MR. TONER: Every one of these counsel have already
15 appeared in the general bankruptcy.

16 THE COURT: Well, I don't care about that now.

17 MR. TONER: Yeah.

18 THE COURT: I just mean, are they going to come
19 forward and -- and file an answer --

20 MS. MOORE: I think they've filed notices of
21 appearance in our Superior AP, Your Honor.

22 THE COURT: Okay.

23 MR. LaTOUR: Your Honor, Fifth Third has filed a
24 notice of appearance; and I believe the Texas group, too, but
25 I'm not absolutely certain of that.

1 THE COURT: Okay, if they appeared you can just
2 mail it to them, or e-mail it them, or however you get it to
3 them, regular, and they can just answer.

4 MR. TONER: Okay. If that's sixty days, yes.

5 THE COURT: All right.

6 MR. TONER: There is an extra appearance I think
7 that Superior wanted to talk about.

8 MS. MOORE: I think we've taken care of the other
9 one, Your Honor.

10 CLERK: (unclear)

11 THE COURT: Okay. For whom? You need the
12 corporate ownership statement filed by the plaintiff.

13 MS. MOORE: Your Honor, I thought we did that, but
14 I will follow up and make sure we did. Thank you.

15 THE COURT: All right, Friona. Status update.

16 MR. TONER: My memory on that is that Your Honor
17 has allowed everyone until September 1 to make whatever
18 amendments to their pleadings they feel are necessary. We've
19 had that Rule 5 order saying that folks don't need to respond
20 to cross-claims and counterclaims --

21 THE COURT: Right.

22 MR. TONER: -- in addition to what they've done.
23 We had on the docket here a discussion of consolidating
24 issues, but counsel for Superior and I feel that once
25 September 1 comes and goes, hopefully those discussions will

1 be better framed, and we take a look at Mr. LaTour's
2 spreadsheet and Ms. DelCotto's spreadsheet about legal issues,
3 and we'll be better positioned in September to tell you what
4 we think the batting order should be.

5 THE COURT: All right. We'll continue that to
6 September 28th at ten a.m. Innovative Livestock vs. Eastern.

7 MR. TONER: Same -- same situation, except there we
8 proposed --

9 THE COURT: Now which one is that? Is that -- is
10 that one of the interpleaders?

11 MR. TONER: Innovative, I believe, is --

12 MS. MOORE: I think that's Kansas, Your Honor.

13 MR. TONER: Yes.

14 THE COURT: The Kansas --

15 (Low-voiced multiple discussions)

16 MS. MOORE: Rush Creek is Colorado.

17 MR. TONER: Right, Breeding Brothers is Colorado.

18

19 MS. MOORE: So Rush Creek is Wisconsin.

20 MR. TONER: Rush Creek is Wisconsin. All of these
21 we have proposed that September 16 be a deadline for any
22 parties to amend their pleadings, do any changes they feel are
23 necessary, and then by the end of September whatever responses
24 to counterclaims or cross-claims are necessary to have those
25 filed. Those deadlines have been well-received, and

1 hopefully we'll have something more formal to tender to make
2 that official.

3 THE COURT: All right. So for all the interpleader
4 actions, that includes Rush Creek and Breeding Brothers, we're
5 going to continue those to the next omnibus date?

6 MR. TONER: That's right, and at that time
7 hopefully the pleadings will be just about closed in those
8 cases. There are couple of service issues still lagging out
9 there in Colorado, I believe; but otherwise it looks like
10 folks have shown up.

11 THE COURT: So we have -- are we -- right now we
12 just have four interpleader actions?

13 MR. TONER: Yes.

14 THE COURT: All right. Friona, Innovative, Rush
15 Creek, and Breeding Brothers.

16 MR. TONER: Correct.

17 MS. MOORE?: Superior.

18 THE COURT: I'm sorry, did somebody on the phone
19 say something? Okay. All right, that's all I have on my
20 agenda this afternoon. Do parties have other matters to
21 bring before the Court?

22 (No response).

23 THE COURT: All right, I just want to continue to
24 encourage the parties to do some of the things they're
25 obviously already doing in terms of trying to streamline

1 matters whenever possible. I want to restate what I've said
2 earlier that even though I've said there need to be
3 adversaries, or it looks like there needs to be adversaries to
4 resolve some of their remaining issues about the monies that
5 are now going to be paid to the estate, that that doesn't
6 foreclose the possibility of resolving a discrete issue here
7 and there by -- by motion.

8 And, you know, the other underlying issue that we've
9 touched upon or danced around today, and that is the fact that
10 there's a lot of work that's going to have to be done in this
11 estate. Hopefully we are going to be able to administer this
12 estate for the benefit of the creditors. That's what we're
13 supposed to be doing, and everyone has to be conscious of
14 their clients' interests and of the fact that we have to pay
15 to administer the estate, that there's a cost to doing
16 business in this Court, and that's going to be ongoing. It's
17 going to be reviewed, it's going to be reasonable, and it's
18 -- but it's going to be there, so I want everybody to keep
19 that in mind, too.

20 Anything further this afternoon?

21 (No response)

22 THE COURT: We're adjourned.

23 (End at 3:22:41 p.m.)

24 * * * * *

25

1 I certify that the foregoing is a true and accurate
2 transcript from the digitally sound recorded record of the
3 proceedings.

/s/ Gloria C. Irwin

9/9/2011

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